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No. 95-1249

IN THE

Supreme Court of the United States

October Term, 1995

LAWTON M. CHILES, JR., et al.,

Petitioners

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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1 APP

QUESTIONS PRESENTED

Respondents' brief in opposition restates the questions presented for review. As stated in the petition for a writ of certiorari, the questions presented are:

> 1. Whether the respondent officials of the national government violate Article IV, §4 and the Tenth Amendment when they pursue policies that permit exorbitant numbers of illegal aliens to enter a tiny minority of states, and fail to make equitable restitution of the huge and disproportionate costs thereby imposed on those states and their political subdivisions.
>
> 2. Whether a claim that the Attorney General and other officials of the national government have violated the immigration laws by adopting and pursuing a general policy that is so extreme as to amount to an abdication of statutory responsibilities presents a question committed to agency discretion by law.

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REPLY TO RESPONDENTS' STATEMENT

Respondents rely on a number of statistics from the *INS Fact Book: Summary of Recent Immigration Data* 34–36 (August 1995) to make it appear as if the national government is now making a concerted effort to control illegal immigration. They claim to have "expelled" approximately 43,000 aliens "through adjudicative proceedings" in 1994 (although it is not clear that this number of persons actually left the United States). However, the INS estimates there are 3.4 million illegal immigrants living in the United States and that this number increases by almost 300,000 every year.[1] If 43,000 represents an annual "expulsion" figure, the government expels less than 1.26% of the total illegal population every year. Moreover, 43,000 is only a small fraction of the

1 *See* Clark, Passel, Zimmerman & Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994) at ii, 5–6.

annual *increase* in the resident illegal alien population. Plainly, Florida's already massive expenditures will only increase.

Although Congress has appropriated money to assist states with incarceration costs, as respondents point out, the amount is no more than a token. Respondents' facts admit what the petition asserted: that the national government's *total* annual enforcement expenditures of $1.2 billion scarcely exceed what illegal immigration annually costs Florida *alone*.

REPLY TO RESPONDENTS' ARGUMENT

The brief in opposition essentially denies that Florida suffers any burden that it has not chosen to assume or that is not constitutionally compelled. Ultimately, it concludes that *whatever* the reason for Florida's burdens, sovereign immunity precludes recovery. The issues are not so simple and they cry out for definitive resolution.

1. Respondents erroneously maintain that there are no judicially manageable standards for resolving petitioners' claims under the Guarantee Clause and the Tenth Amendment. This argument assumes the Guarantee Clause means nothing, at least until a state's governmental processes actually break down; and that despite the Tenth Amendment the national government has the right to effectively conscript *some portion* of a state's resources. *If* the constitutional question is one of degree, it is certainly not beyond judicial competence. As Justice Kennedy recently made clear with respect to interpretation of the Commerce Clause:

> Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution.

United States v. Lopez, 115 S.Ct. 1624, 1637 (1995) (Kennedy, J., joined by O'Connor, J., concurring) (quoting *Wickard v. Filburn*, 317 U.S. 111, 123 n. 24 (1942)).

The generality of the Constitution's "great concepts" is not confined to the Commerce Clause. The Constitution does not tell us what "just compensation" means; it does not tell us what racial mixture distinguishes a desegregated school system from a segregated school system; nor does it tell us the precise constitutional limitation on contributions by individuals to political campaigns.[2] Likewise, it does not tell us at what exact point support flowing indirectly to a religious institution crosses the bounds of permissibility and becomes an Establishment Clause violation.[3]

Where, as here, the controlling principles are clear, judicially manageable standards exist. It is the task of this Court to recognize those principles, as clearly formulated in the petition for certiorari, and apply them on a case-by-case basis. There should be no difficulty of application in this case, where the extreme facts establish violations of both the Guarantee Clause and the Tenth Amendment. The respondents are really saying that no matter how onerous the burdens that befall a state because of the national government's accommodation of illegal immigration, a court can never find a violation of Article IV, §4, or the Tenth Amendment. It matters not to their reading of the Constitution how many billions of dollars a state must pay to support this national policy. This Court, however, is fully capable of determining that such burdens cannot be heedlessly thrust upon a state; and that Florida and other states similarly situated are not agents of the national government whose resources may be conscripted without accountability.

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2 *See, e.g., Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. February 7, 1995) (No. 95-1258).

3 *Compare Mueller v. Allen*, 463 U.S. 388 (1983), *with Committee for Public Education v. Nyquist*, 413 U.S.756 (1973).

2. Respondents also misconstrue this Court's Guarantee Clause analysis in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992), and therefore misunderstand *New York's* relevance to this case. Contrary to respondents' too hasty analysis, this Court did not hold that the "take title" statutory provision did not violate the Guarantee Clause. Rather, having held that provision invalid under the Tenth Amendment, the Court had no occasion to consider its validity under the Guarantee Clause. The Court considered the applicability of the Guarantee Clause only to two other provisions of the challenged statute, finding that each offered states a "legitimate choice" rather than an "unavoidable command." 112 S.Ct. at 2433.

Florida has not been offered a choice. Hence, the constitutional claim asserted in this case is most closely analogous to the "commandeering" claim sustained on the merits in *New York v. United States*—not, as respondents erroneously assert, to the claims found to lack merit under the Guarantee Clause.

In emphasizing that no Congressionally enacted statute directly exerts a coercive, commandeering force on the state's political process, respondents entirely ignore the *practical* compulsion to which Florida is subject. The decision to neither effectively enforce the immigration laws nor assist the burdened states is an exercise of power irrespective of the absence of legislation. The state's choice, as the district court recognized, is a "Hobson's choice"—that is, no choice at all. It may be surmised that respondents fail to refute this central point for the simple reason that it is irrefutable. For all practical purposes, Florida has been coerced, and its political process has been commandeered.

Respondents are also far too hasty with their contention that, as a result of *Plyler v. Doe*, 457 U.S. 202 (1982), a state's obligation to educate undocumented alien children is strictly a matter of Fourteenth Amendment jurisprudence. In *Plyler*, this Court plainly left it open to Congress to relieve the states

of this burden, 457 U.S. at 224–226, and five Justices voiced the opinion that the national government had an obligation to assume educational expenses for illegal aliens. *Id.* at 241 and 242 n. 1. Although from time to time the issue has become a political football, the fact remains that Congress has done virtually nothing to assist the affected states.

Respondents' reasoning turns a blind eye to the basic fact that if the national government chose to enforce the immigration laws Florida's expenditures for education and law enforcement on behalf of its alien population would not be necessary. *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), thus cannot support respondents' interpretation of the Tenth Amendment. That case concerned only the Extradition Clause and the constitutional obligation of states to deliver up fugitives, an obligation that cannot, by federal design and policy, be turned into a crushing burden for a few disfavored states.

Respondents completely misapprehend petitioners' claims for health care costs. Public hospitals and other health care facilities do not incur costs for providing care to illegal aliens because Florida participates in the Medicaid program. They incur costs because they have no choice but to provide necessary medical treatment, much of which cannot be reimbursed by Medicaid. Given that Florida's 350,000+ undocumented aliens are a permanent and growing class, there is no more choice in this matter than there is in paying the costs of education and incarceration. All of Florida's claims for restitution are grounded in the Tenth Amendment and Article IV, section 4.

Petitioners must also correct the plain misstatement that Florida pleaded no defect in the political process. (Resp. Br. at 12, n.3) Petitioners pleaded precisely that in the complaint. (¶¶ 61–64, Pet. App. D 26–27) The district court's order acknowledged the failure of the political process. (App. B 23)

3. Respondents misconstrue petitioners' statutory claims. Petitioners have never denied that the relevant immigration

statutes confer a range of enforcement discretion on the Attorney General. Petitioner's claim, instead, is that the Attorney General's nonenforcement policies amount to default of a "duty" to enforce the law imposed by the plain language of 8 U.S.C. §1103(a), and thus lie beyond the scope of discretion conferred. Claims that a United States official has exceeded the scope of discretion conferred are and must be actionable under well settled principles of administrative law. They simply do not come within the exception to reviewability for actions committed by law to agency discretion. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

4. Respondents attempt to evade the argument that the Attorney General's policies lie beyond the scope of lawful discretion by dismissing petitioners' pleadings as "conclusory assertions." Tellingly, however, respondents fail to deny any of the specific pleadings supporting the petitioners' arguments. Moreover, petitioners in the trial court sought discovery of respondents' specific policies toward illegal immigrants in Florida. Respondents refused to answer Florida's interrogatories, instead seeking and obtaining a protective order. Respondents thus fail to recognize that this case comes before this Court on the grant of a motion to dismiss for failure to state a claim on which relief could be granted, and the court of appeals' affirmance thereof, *all prior to discovery*. At this stage of the case, respondents cannot object that petitioners' factual assertions are conclusory. On the contrary, it is well settled that petitioners' assertions must be accepted as *true*.

5. Finally, all else failing, respondents assert their supposed sovereign immunity, contending that Florida's claims are for damages, not restitution. As respondents themselves recognize, neither the district court nor the court of appeals addressed questions relating to sovereign immunity, and this Court need not do so either. It could grant the petition, reverse the lower courts on the substantive questions presented, and remand the case for consideration of available remedies. Petitioners' contention with respect to remedies is

only that if the Court were to reach this question—as it clearly need not do—the doctrine of sovereign immunity would not preclude the award of effective relief and thereby render the Court's substantive judgment effectively unenforceable.

In any event, respondents' reasoning is not persuasive. Control of immigration is the exclusive responsibility of the national government, and therefore Florida's claim is certainly for restitution, not damages. *See Restatement of Restitution* §1 Unjust Enrichment and §115 Performance of Another's Duty to the Public. As respondents point out, the essence of a restitution claim rests on gain to the defendant as well as proof of loss to the plaintiff. Dan R. Dobbs, *Handbook on the Law of Remedies* 222–223 (1993). In paying for our national policy of accommodating illegal immigration, Florida's losses are clearly a gain for the national government, both financially and politically.

Moreover, this case involves a prayer for alternative remedies, including ones which would require payment out of the national treasury. Plainly, this case does not present a quotidian claim for breach of contract or personal injury and the cases respondents cite should not be considered controlling. As this Court has recognized, there are cases in which sovereign immunity must give way. This case is about our constitutional and federal structure. It is about political accountability. And finally it is about whether the respondents may compel one state—and perhaps six others—to bear a burden that the Constitution says should be shared by all. The doctrine of sovereign immunity does not place the national government above the Constitution's commands.

CONCLUSION

The petition for a writ of certiorari should be granted and this case addressed on its merits.

Respectfully submitted,

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